

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAY SOLENTO IRWIN,

Defendant-Appellant.

UNPUBLISHED

January 24, 2006

No. 257405

Saginaw Circuit Court

LC No. 03-023547-FC

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to rob while armed, MCL 750.89; conspiracy to commit armed robbery, MCL 750.157a, MCL 750.529; conspiracy to possess narcotics over 650 grams, MCL 750.157a, MCL 333.7403(2)(a)(i); felon in possession of a firearm, MCL 750.224f; and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to four concurrent terms of 2 years in prison for the felony-firearm convictions, to run consecutive to concurrent terms of 23 years and 3 months to 50 years in prison for the assault with intent to rob while armed and two conspiracy convictions and 4 to 7 years in prison for the felon in possession conviction. We affirm.

Defendant first argues that there was insufficient evidence to sustain his conviction as an aider and abettor of assault with intent to rob while armed. We review de novo a claim of insufficient evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). However, we will not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *Id.* at 561.

The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Additionally, there must be evidence that the defendant intended to rob or steal, because it is a specific-intent crime. *Id.* It is not necessary to show that a defendant had the specific intent to rob the person that was assaulted; rather, it is only necessary to prove that the assault was committed as a means to further the intended robbery. *People v Harris*, 110 Mich App 636, 643-644; 313 NW2d 354 (1981).

An aider and abettor may be convicted and punished as though he directly committed the offense. MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). To obtain a conviction for aiding and abetting, the prosecutor must show that: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). Additionally, an aider and abettor must have the same requisite intent as that required of the principal. *Mass*, *supra* at 628.

Defendant specifically argues that there was insufficient proof that his co-conspirators had the requisite intent to rob the police or the homeowner at the time of the assault. Defendant maintains that, because the officers announced their presence when they entered the home, the co-conspirators no longer had the intent to rob and merely engaged in the assault to flee the scene. However, no evidence was presented that the co-conspirators even heard the police or that they believed the people entering the home were in fact police. Indeed, at least one of the two policemen and the DEA agent were wearing plainclothes, and one of the officers testified that they announced their presence in a joking and sarcastic manner because they were on a routine consent search and did not expect anyone to be at the home. Further, the factfinder may have concluded that the co-conspirators maintained their intent to rob even if, in fact, they knew police were present.

As noted above, we will not interfere with the jury's role in determining the weight of the evidence. *Fletcher*, *supra* at 561. A rational jury could have inferred that the co-conspirators believed the police and female homeowner were actually the persons they were anticipating, i.e., the drug dealer and the homeowners, or, that the co-conspirators still intended to steal the money and drugs, escaping with the contraband by use of force. Viewing the evidence in a light most favorable to the prosecution, sufficient evidence existed from which a rational trier of fact could find beyond a reasonable doubt that defendant aided and abetted in an assault with intent to rob while armed.

Defendant next argues that the trial court erred in scoring offense variables 3 and 14. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

MCL 777.33(1)(c) concerns physical injury to a victim and provides that 25 points are to be scored where "[l]ife threatening or permanent incapacitating injury occurred to a victim." Defendant argues that there was no record evidence to support a conclusion that the injuries sustained by the police were either life threatening or permanently incapacitating. However, one of the officers testified that he was shot in the face—the bullet entered through his nose and exited through his cheek, then went through his arm. Another officer testified that he suffered three bullet holes to his stomach, which required hospitalization. The trial court did not abuse its discretion in assessing 25 points for OV 3 where there was record evidence to support a conclusion that the officers' injuries were life threatening.

MCL 777.44(1)(a) concerns the offender's role and provides that ten points are to be scored where "[t]he offender was a leader in a multiple offender situation." We view the entire criminal episode when determining if an offender was a leader in a multiple offender situation. *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). Defendant argues that there was no record evidence to support a conclusion that he provided assistance to those carrying out the contemplated robbery or that he played a leadership role in the relevant crimes. However, there was evidence that defendant was the only person aside from the homeowners and drug dealer who had knowledge that a transaction was scheduled to occur at the house on the morning of the incident. Further, there was evidence that defendant was the only person other than the homeowners who had a key to the house on that date. The absence of evidence of a forced entry indicates that defendant provided access to the co-conspirators to get into the house. The trial court did not abuse its discretion in assessing ten points for OV 14 where there was record evidence to support a conclusion that defendant was a leader in a multiple offender situation.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White